Global South climate litigation versus climate justice: duty of international cooperation as a remedy?

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Imagine for a moment that you are a Bolivian small farmer whose livelihood depends on the continuing flow of a river to water your crops. Now, due to climate change, glaciers that used to feed local rivers are retreating, leading to a substantial reduction in water availability. After a couple of years, you see in the local newspaper that a fellow citizen, a concerned industrial farmer, won a constitutional lawsuit against the state of Bolivia for having failed to meet its state duty to mitigate CO2 emissions. As a result, the state decides to raise taxes to meet its judicial obligations. Does this approach coalesce with the tenets of climate justice? Is it fair that a country that has marginally contributed to the climate crisis is now obliged to shoulder it? What options, if any, do courts in developing countries have to order remedies that might also tackle climate justice issues?

This piece is an attempt to address these questions.

Climate litigation in the Global South

The unfulfilled international promises have led many activists and lawyers to turn to domestic courts to address ongoing acute climate disruption. Whilst climate litigation before domestic courts against states as well as non-state actors initially started in the Global North in the 1990s, the recent decade has also seen its increased use in the Global South. Today, thousands of lawsuits have been filed globally before numerous types of courts, using a diverse repertoire of legal arguments and invoking different legal sources, including international law.

Climate litigation in countries of the Global South have yielded landmark cases delivered by domestic courts, for example, in Pakistan, Colombia and South Africa. In parallel, academics have started to examine the central features of Global South climate litigation and its contribution to comparative climate change law. A salient feature of Global South climate litigation is the use of human and constitutional rights based arguments by plaintiffs and responsiveness of domestic courts to these arguments. In that vein, scholars suggest that in essence, plaintiffs in cases across the Global South have claimed that the state, by not implementing mitigation or adaptation policies conducive to the avoidance or attenuation of climate-related harm, are violating fundamental rights enshrined in Constitutions and international human rights treaties. When doing so, plaintiffs in many of these cases are including climate change only as ancillary arguments, and placing at the forefront more pressing and tangible environmental demands, like deforestation or the protection of specific ecosystems.

In many of these Global South cases, courts not only accepted the rights-based arguments of the plaintiffs, but also ordered remedies, such as issuing injunctions against the defendant state and ordering the implementation of specific measures aimed at ceasing or preventing the harm. In the cases of Colombia and Pakistan, defendant states were compelled to create specialized boards, composed by government officials in liaison with civil society organizations, to enforce extant policies through specific action plans conducive to address climate change concerns.

The remedy conundrum in Global South climate cases

Although the remedies delivered by Global South courts might give the impression of being comprehensive, proportionate and specific, they also point to a tension between climate justice and the outcomes of litigation. Whilst Global South litigators win court cases based on human rights law and constitutional law, the states that need to offer remedies are generally not major contributors to global GHG emissions. Moreover, these same countries do not often possess the structural capabilities to implement said ambitious and comprehensive remedies. After all, they did not engender nor primordially further the global crisis, on the contrary, they are disproportionally impacted by it.

This climate litigation remedy conundrum is likely to resurface also before international and regional human rights bodies, when they decide on their first climate case based on human rights law. Even though no international and regional body have yet ruled in favour of victims seeking reparations over climate-related impacts, it is only a matter of time this comes to fruition. The surge of domestic climate cases and recent authoritative criteria that address the linkages between climate change and human rights, are becoming parameters that international adjudicative bodies are already resorting to inform their decisions, an aspect that may eventually lead to establishing state responsibility for a wrongful act under International human rights law.

If human rights courts follow the seminal *restitutio in integrum* standard set forth by the Inter-American Court of Human Rights in Velasquez Rodriguez v. Honduras for indemnification for pecuniary and non-pecuniary damages, states that contribute the least to climate change might be ordered to compensate for victims, and the wherewithal to comply with it will ultimately be borne by tax payers, that is, people from the same state who will be also hit by climate impacts. With this, I am not suggesting that developing or vulnerable countries should be exempted from their human rights duties, but considering the legitimate climate justice arguments, remedies ordered by domestic courts and international human rights bodies might benefit from addressing the complex and multi-layered nature of the climate problem and the concomitant justice questions it raises.

Duty of international co-operation as a remedy?

If the main structural obstacle for developing countries to comply with potential climate-related judgments is the lack of expertise and resources – both financial and technical, domestic and human rights courts can breathe life into states' international obligations to co-operate with other states to ensure non-repetition. Concretely,

courts could establish obligations of conduct for states to do their best effort to cooperate with other states or multilateral institutions to protect the rights of its citizens from climate-related harm. Ultimately, the formulation of a remedy that integrates a duty to internationally co-operate, indirectly addresses the climate justice question by requiring the defendant state to perform at its best when it comes to finding international assistance and co-operation, particularly with those states that pollute the most or with financial institutions that might provide appropriate funding.

United Nations Charter Article 1(1, 3), as well as Article 2 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) offer essential doctrinal direction in this regard as it lays out the duty of states "to take steps […] through international assistance and co-operation, especially economic and technical, […] with the view to achieving progressively the full realization of […] rights". In that connection, the ICESCR's treaty body specified in its 'General Comment No. 3' that international co-operation is an obligation of all States, an approach that resonates with UNFCCC Article 4 (1) (c, d, e, g, h, i) and Article 12 of the Paris Agreement. Hence, adjudicative bodies could invoke these sources of international law as persuasive authority to inform their remedial requests and communicate to states that they are not exclusively responsible for the causes of climate change that lead to human rights violations, but they have obligations to take all appropriate measures to bridge the resources gap, which entails proactively outreaching for cooperation to redress violations and ensure non-repetition. Additionally, judges could also draw from the reporting obligations under Article 13 (10) of the Paris Agreement, namely on providing information on the support needed for finance, technology transfer and capacity-building.

It is worth mentioning that UN treaty bodies employ the obligation to cooperate in the context of climate change as a human rights duty. For instance, in 2018, the Committee on the Elimination of Discrimination against Women (CEDAW) stressed in its General Recommendation No. 37 on Gender in the context of climate change, that an "adequate and effective allocation of financial and technical resources for […] climate change prevention, mitigation and adaptation must be ensured both through national budgets and by means of international cooperation". The same year, CEDAW and the Committee on the Rights of the Child (CRC) published their Concluding Observation on the report of the Marshall Islands and Palau respectively, which nicely capture the very spirit of the envisaged formulation for future remedies. CEDAW recommended the state to "[s]eek international cooperation and assistance, including climate change financing, from other countries, in particular the United States, whose extraterritorial nuclear testing activities have exacerbated the adverse effects of climate change and natural disasters in the State party". The CRC used a similar approach.

Turning the duty to co-operate into a judicial remedy might reproduce the very same limitations that multilateral negotiations face when it comes to fleshing out some of the principles in the climate regime, i.e. common but differentiated responsibilities and respective capabilities. However, when courts impose a specific remedy to co-operate, the scope of diplomatic manoeuvre for states narrows down, and

what otherwise is a nebulous kind of obligation to cooperate, has the potential to become a concrete one, in particular with judicial follow up and imposition of time-frames. Another potential drawback is the foreseeable allegation that courts might be holding attributions beyond their mandate, thus sequestering the role of other branches of government with established legitimacy in matters of cooperation. Nevertheless, most of the times, courts do have the fiat to interpret the law to set minimum obligations with ample margin of discretion as to avoid commotion with the *trias politica*, an argument that has been immortalized in the *Urgenda v. State of the Netherlands* case.

Conclusion

Global South climate litigation is actively employing human rights law and is likely to transform human rights law along the way. The traditional human rights approach to reparations, which enables victims to seek restitutions from their own state, is one area in need of transformation given that developing states are not fully responsible for adverse effects of climate change. I hereby suggested that international and regional adjudicative bodies might address this remedy conundrum if they integrate into their rulings demands to internationally co-operate as an obligation of conduct. In so doing, they could instruct states to do their utmost effort to seek suitable resources, specially from more affluent countries, to protect those human rights threatened or encroached by climate change. UN human rights treaty bodies are already delineating such approach, a practice that could benefit from more granularity. Finally, there is still plenty of room to explore another alternative to this proposal, namely, extraterritorial human rights adjudication for climate-related harms, where plaintiffs from vulnerable and poorer countries could take cases against developed states or big pollutants in their main domicile home states. But these, for the time being, are work in progress.

Juan Auz is an Ecuadorian attorney specialized in International Environmental Law and a PhD Candidate at the Hertie School's Centre for Fundamental Rights in Berlin.

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